SUPREME COURT, U. S.

MAY 16 1968

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 107

MATTHEW IANNIELLO,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MAURICE EDELBAUM
250 Broadway
New York, New York 10007

EVSEROFF, NEWMAN & SONENSHINE
186 Joralemon Street
Brooklyn, New York 11201
Attorneys for Petitioner
212—UL 5-1111

WILLIAM SONENSHINE
Member of the Bar of the Supreme Court of the United States
Of Counsel

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No.

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—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above entitled case on February 21, 1968 (21 N.Y. 2d 418).

A. Opinions Below

There were various opinions in the various courts below as follows:

(1) Order of Mr. Justice Marks sitting at Special and Trial Term Part 30 in the Supreme Court of the State of New York, New York County, dated November 16, 1965,

denying pre-trial motion to dismiss indictment. (Annexed hereto as Appendix A). Said opinion is not officially reported.

(2) Order of Mr. Justice Marks sitting at Special and Trial Term Part 30 in the Supreme Court of the State of New York, New York County, dated June 22, 1966, which order granted reargument of the above-mentioned pre-trial motion and, upon reargument, dismissed the indictment upon the ground that it was obtained as a result of evidence secured by violating petitioner's 6th Amendment right of counsel. Said opinion and order is annexed to the petition as Appendix B. Said opinion is not officially reported.

(3) Opinions of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department thereof, affirming on June 15, 1967, upon appeal of the District Attorney, the order of Mr. Justice Marks dismissing the indictment. Said affirmance was by a divided court, three judges voting to affirm the dismissal and two judges dissenting. Said opinions are officially reported at 27 A.D. 2d 504. The majority and dissenting opinions are annexed to the petition as Appendix C and D respectively.

(4) Opinion of the Court of Appeals of the State of New York unanimously reversing the order of the Appellate Division of the Supreme Court of the State of New York, and reinstating the indictment upon appeal by the District Attorney. Said opinion is officially reported at 21 N.Y. 2d 418. A copy thereof is annexed to the petition as Appendix E.

There were no other opinions written in connection with the case.

B. The Grounds Upon Which the Jurisdiction of this Court Is Invoked

Jurisdiction in this Court is invoked under Title 28, U.S. Code § 1257 (3) and Rule 19, Subdivision 1 of the rules of this Court.

The judgment sought to be reviewed herein is the judgment of the Court of Appeals of the State of New York (21 N.Y. 2d 418) made on February 21, 1968 as aforesaid, and annexed hereto as Appendix F.

C. The Question Presented for Review

1. Does an indictment charging the crime of criminal contempt by evasive answers before a grand jury contravene the right to counsel under the Sixth Amendment to the United States Constitution where the alleged evasive answers were obtained from the defendant following a refusal by the grand jury and the prosecutor to allow the witness to leave the room to consult his attorney who was immediately outside the grand jury room?

D. Constitutional Provisions and Statute Involved

The constitutional provisions involved herein are that portion of the 6th amendment to the U.S. Constitution relating to the right of counsel and that portion of the 14th amendment relating to due process of law.

The statute involved is §600 of the Penal Law of the State of New York.

Each of the foregoing is set forth verbatim in this petition as appendices G, H, and I respectively.

E. A Concise Statement of the Case and Material Facts Pertaining to the Consideration of the Questions Presented

Petitioner testified as a witness before a New York County Grand Jury investigating bribery and corruption among public officials. He testified at great length answering numerous questions put to him. He testified at separate sessions on June 11, 1964 and June 18, 1964. During the first session he requested, but was refused an opportunity to consult with counsel who was outside the Grand Jury room. This refusal and its ensuing consequences comprise the subject matter of this petition. During the second session petitioner did not make any request to consult with counsel.

Based upon the testimony thus elicited the Grand Jury indicted petitioner in a four count indictment charging him with criminal contempt in that his testimony that he could not recall certain occurrences or conversations was allegedly evasive.

Petitioner entered a plea of not guilty. Thereafter he moved to dismiss the indictment upon the ground, among other things, that the refusal to allow him an opportunity to consult with counsel outside the Grand Jury Room amounted to a deprivation of his right to counsel under the Sixth Amendment to the United States Constitution. That motion was originally denied. Subsequently the motion for reargument was granted and the Court dismissed the indictment by reason of the denial of counsel.

The District Attorney thereafter appealed to the Appellate Division of the Supreme Court of the State of New

York, First Judicial Department. The majority of that Court upheld the order dismissing the indictment—but upon other grounds, stating that in view of such other grounds it was "unnecessary to reach the issue of defendant's right to consult counsel * * *." The minority opinion took the view (citing *In Re Groban*, 352 U.S. 330) that "a witness is not entitled to counsel," and that in any event he had the benefit of counsel.

Thereafter the District Attorney obtained leave to appeal to the New York Court of Appeals. That Court reversed the order of the Appellate Division and reinstated the indictment. The New York Court of Appeals held, among other things, that while a witness in certain circumstances is entitled to leave the Grand Jury Room to consult with counsel, under the circumstances of the case at bar the witness was not so entitled. This approach is the subject matter of this petition and is expanded upon in sub-division G of this petition.

A motion for reargument was thereafter denied without opinion by the New York Court of Appeals.

The case is presently awaiting trial in the Supreme Court of New York County.

F. The Stages of the Proceedings in Which the Issues Involved Were Raised and the Manner in Which They Were Raised

The constitutional issues presented herein were raised at the first available opportunity, namely by timely pre-trial motion directed to the legal sufficiency of the indictment by attacking its sufficiency upon the ground that the

proceedings before the Grand Jury resulted in the instant indictment in violation of petitioner's rights under the 5th, 6th, and 14th amendments to the U.S. Constitution. The motion was made before the Hon. Charles Marks, a Justice of the New York Supreme Court and resulted originally in a denial of said motion as set forth in Appendix A. Subsequently a motion was made to reargue the original motion. As appears from Appendix B, Mr. Justice Marks, upon reargument, vacated his prior order and entered a new order dismissing the indictment upon the constitutional grounds therein set forth. The issues were thereafter reiterated and made the subject of the appeals in the Appellate Division of the Supreme Court and in the New York Court of Appeals.

C. Argument Amplifying the Reasons Relied On for Allowance of the Writ

POINT ONE

The refusal by the Grand Jury and the District Attorney to allow petitioner, while testifying before the Grand jury, to consult with counsel who was outside the room was a violation of his constitutional rights to counsel.

The issue posed herein is a novel one which does not appear to have been passed upon by this Court. Yet, while precedent may be lacking, guiding principles are not.

In the early stages of petitioner's examination before the Grand Jury he was questioned as to a certain conversation with one Benny Cohen. Petitioner thereupon requested

permission to leave the room for a minute to inquire of his attorney outside the room whether he was legally obliged to answer the questions.

Following that request a five page colloquy ensued between the witness (petitioner) and the assistant district attorney during which the witness repeatedly sought and was denied permission to consult his attorney. The entire colloquy is as follows:

> Q. Does that enable you to be able to deny ever having such a conversation with Benny Cohen? A. Could I excuse myself to see my attorney for a minute?
>
> By Mr. Scotti:
>
> Q. Your attorney doesn't know the answer. You are the one who knows. A. I want to ask him if it's a proper question.
>
> Q. I'm telling you, as legal advisor to this grand jury, it's a proper question. A. May I ask the foreman of the grand jury if I may excuse myself for a minute, please?
>
> Q. Mr. Ianiello, we are not going to consent to the practice of your excusing yourself to confer ostensibly with your attorney in order to find out what kind of an answer you should make. You are the one that is legally obligated to give testimony and not your attorney.
>
> Now, are you refusing to answer the question? A. I'm not refusing.
>
> Q. After you answer the question you can confer— A. I'd like to confer with my attorney because I think it's an improper question.
>
> Q. Why? A. I don't know.
>
> Q. Why? Why is it improper? You said you think it's improper. A. I wouldn't need an attorney outside if I knew why. I think it's an improper question.

Q. Why do you think it's improper, why? A. I don't know why.

Q. Because it's a very very serious matter. It involves your knowledge of payoffs, your knowledge of the fact that you were receiving information, confidential information from certain members of the Police Department, is that the reason why it bothers you? A. Mr. Scotti—

Q. You are on the spot, is that the reason? Is that the reason why you hesitate because an answer to that question, an affirmative answer, would mean to this grand jury that you are admitting that you do have information from the police and that you do business with the police? Is that what you are worried about? Is that what you are— A. Mr. Scotti, you are drawing conclusions. You made your statements, you might as well indict me. You have all the evidence.

Q. Why don't you want to answer the question? A. There is no use to go any further unless I consult my attorney.

The Witness: Mr. Foreman, do I have your permission to leave this room and consult my attorney?

Mr. Scotti: Shall we go to court for a direction.

The Witness: Go to court. I don't understand the question.

Mr. Scotti: We will go in open court, then, and make an application.

You don't understand the question.

Mr. Reporter, read the question.

The Witness: I didn't—

Mr. Scotti: Now, he said he doesn't understand the question.

The Witness: I didn't say—I said, "Will you please repeat the question. Don't jump conclusions.

Mr. Scotti: Read the question. Mr. Reporter, will you be good enough to read what the witness said a little while ago.

(Whereupon, the reporter read as follows:

"Question: Why don't you want to answer the question?

Answer: There is no use to go any further unless I consult my attorney.

The Witness: Mr. Foreman, do I have your permission to leave this room and consult my attorney?

Mr. Scotti: Shall we go to court for a direction?

The Witness: Go to court. I don't understand the question.

Mr. Scotti: We will go in open court, then, and make an application.")

Q. Now, has your memory been refreshed that you said you didn't understand the question? A. Yes, sir.

Q. We accept your apology. A. Thank you.

Q. Now, are you willing to answer the question?

The Witness: Mr. Foreman, may I please leave the room to consult with my attorney as to the significance of the question?

The Foreman: I can't give you permission to do so without consent of Mr Scotti.

Mr. Scotti: I advise the grand jury that this is a proper question and that there is no legal question involved.

Now, Mr. Foreman, I ask that you direct this witness to answer the question.

The Foreman: I so direct you to answer.

A. I don't recall the conversation.

The events thus recorded between a seasoned prosecutor and a lay witness before the Grand Jury which returned

this indictment depict a classic illustration of the wisdom of the framers of the Constitution when they wrote into that document the unalterable right to the assistance of counsel (U.S. Constitution Amendment 6; New York State Constitution, Article 1 §6).

The indictment at bar is exclusively predicated upon testimony obtained from this petitioner after the aforementioned incident had occurred.

The principles of law dealing with the right to counsel have in recent years been largely expanded with a view toward insuring a more sophisticated treatment of persons under interrogation by prosecuting officials. (*Miranda* v. *Arizona,* 384 U.S. 436.) This Court succinctly stated in *Massiah* v. *U.S.,* 377 U.S. 201, 204:

> "A constitution which guarantees a defendant the aid of counsel at . . . trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. Anything less . . . might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.' "

In *Ex Parte Sullivan,* 107 F. Supp. 514, 517-518 (quoted with the approval of *Escobedo* v. *Illinois,* 378 U.S. 478 at page 488), the Court commented:

> "One can imagine a cynical prosecutor saying: 'Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial.' "

It would therefore appear that upon well-established and long cherished principles of law the flat refusal of the Grand

Jury and the District Attorney to allow the then witness to speak to his counsel outside the Grand Jury room with respect to a perfectly reasonable desire on his part to ascertain the nature of his legal obligation to answer the questions propounded, deprived him of counsel. Such a deprivation of counsel must necessarily preclude the use of any statement or testimony thereafter given by the witness. Since the indictment was founded exclusively upon subsequent testimony the indictment was improperly obtained.

The New York Court of Appeals, in its opinion reinstating the indictment, while acknowledging the general right to counsel, qualified that right by limiting it to specific situations. In holding that this petitioner had no right to consult counsel, that Court said:

> "Whether and to what extent the witness ought to have a right to consult with his lawyer depends upon an analysis of the proper role of counsel in these circumstances, and the need to avoid procedural strictures which would impair the effectiveness of grand jury investigation.
>
> "If the instant record left any room for the possibility that defendant in fact needed legal counsel or, in good faith, asked for aid of counsel in a proper matter (as opposed to strategic advice in answering questions), affirmance would be required in the interest of fairness. The record, however, makes it abundantly clear that the aid of counsel was not required, and that defendant with full awareness was seeking help only in answering questions he found embarrassing. Defendant's request for his lawyer's advice was limited to whether the question put to him was 'proper.'"

We respectfully urge that the Constitutional guarantee of counsel carries no inherent characteristic attenuating its unqualified thrust. Counsel was readily available to the witness immediately outside the Grand Jury room. Petitioner sought his advice on but one occasion—and that request was capriciously denied by the prosecutor and the foreman. We are thus deeply and directly involved with the full meaning of the Constitutionally guaranteed right to the assistance of counsel, particularly when such assistance is affirmatively requested. To deny that right in the circumstances at bar would be to allow "illegitimate and unconstitutional practices [to] get their first footing—by silent approaches and slight deviation from legal modes of procedure." (*Boyd* v. *U.S.*, 116 U.S. 616, 635 [1886]).

CONCLUSION

The writ of certiorari herein prayed for should be granted.

Respectfully submitted,

MAURICE EDELBAUM
250 Broadway
New York, New York 10007

EVSEROFF, NEWMAN & SONENSHINE
186 Joralemon Street
Brooklyn, New York 11201
Attorneys for Petitioner

WILLIAM SONENSHINE
Of Counsel

APPENDICES

APPENDIX A

Opinion of New York Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Indictment No. 378-65

THE PEOPLE OF THE STATE OF NEW YORK

against

MATTHEW IANNIELLO,

Defendant.

MARKS, J.:

The accused is charged with four counts of criminal contempt in that he allegedly testified evasively before a New York County Grand Jury. He has previously demurred to the four accusations and they were disallowed by another Justice of this court (April 22, 1965). In the filed opinion, the court stated that the "defendant's replies that he could not or did not 'recall' certain alleged incidents phrased by him in various forms are susceptible of the reasonable interpretation that they are convenient devices contrived by him to evade answering." This opinion is res judicata upon this court. The only question to be passed upon here is whether the procedure granting immunity to the accused clothed him with sufficient protection so that his alleged evasive answers could be deemed

contumacious. This court holds that whether or not the procedure outlined in section 2447 of the Penal Law was followed in this investigation is immaterial. The district attorney, in the presence of the Grand Jury, admonished the witness (the accused) that the Grand Jury had voted to confer immunity upon him from prosecution for whatever crimes his testimony may disclose. This court holds that the foregoing is tantamount to compliance. From the colloquy, as revealed on pages 1110-1111 between Mr. Scotti, the Assistant District Attorney, and the accused, definitely demonstrated that the accused understood that immunity was conferred upon him. It is needless to say that had he been indicted for a crime which his testimony had revealed, he would have been held under the cases (People v. Laino, 10 N Y 2d 165; People v. Stending, 6 N Y 2d 214) to have been deemed immune from prosecution.

The motion is in all respects denied.

Dated: November 16, 1965.

CHARLES MARKS
J. S. C.

APPENDIX B

Opinion of New York Supreme Court upon Re-argument

SUPREME COURT

NEW YORK COUNTY

SPECIAL AND TRIAL TERM—PART XXX

Indict. No. 378/65

THE PEOPLE OF THE STATE OF NEW YORK,

against

MATTHEW IANNIELLO,

Defendant.

MARKS, J.:

On November 16, 1965 a motion heretofore made by the defendant to dismiss the indictment was in all respects denied by this court.

A motion has now been made for reargument and such reargument is granted. The original motion was an omnibus motion for various forms of relief. Several questions raised on said motion have already been passed upon and will not be considered on this reargument. One of the questions raised in the original motion papers and not passed upon concerned the claim that the accused was denied access to counsel. The court will therefore take under consideration the effect upon an indictment for criminal contempt of the testimony of the accused after he has been

denied access to his counsel who was outside the grand jury room. The testimony given by the defendant after he was denied the right to counsel forms the basis of this indictment.

In the early stages of the accused's testimony he sought permission to consult his attorney with reference to questions which were put to him in the grand jury room. The minutes of the proceedings disclose a series of questions put to the defendant by the assistant district attorney after the defendant asked permission to speak to his lawyer, all of which requests were refused by both the foreman of the grand jury and the assistant district attorney.

The defendant was then compelled to answer numerous questions most of which answers are now the subject matter of this indictment.

This court feels that no elaborate discussion is needed to emphasize the importance which the constitutional right to assistance of counsel holds under our system of law (U. S. Constitution, Sixth Amendment; New York State Constitution, Article 1, Section 6; Escobedo v. Illinois, 378 U. S. 478. See also Massiah v. United States, 377 U. S. 201, 204; see also Ex Parte Sullivan, 107 F. Supp. 514, 517, 518).

In People v. Donovan, 13 N Y 2d 148, Judge Fuld, in holding that the denial of access to counsel was a violation of the right to counsel and any statement taken could not be used against a defendant upon a subsequent trial, stated:

> "It needs no extensive discussion to establish the high place which the privilege against self incrimination enjoys in our free society. The right of an accused to counsel as a procedural safeguard in our system of government enjoys equal eminence. (See e.g., People v. Waterman, 9 N Y 2d 561, 565; supra; Cicenia v. Lagay, 357 U.S. 504, 509, supra; Crooker v. California, 357 U. S. 433, 439, supra). In the case

> before us, these rights and privileges converge, for one of the most important protections which counsel can confer while his client is being detained by the authorities is to preserve his client's privilege against self incrimination and prevent the deprivation of that and other rights which may ensue from such detention. It would be highly incongruous if our system of justice permitted the district attorney, the lawyer representing the State, to extract a confession from the accused while his own lawyer, seeking to speak with him, was kept from him by the police."

Further, Judge Fuld quoting from the opinion of Judge Dye in People v. Noble, 9 N Y 2d 571, 574 pointed out that the denial to the right of counsel violates "the fundamental fairness essential to the concept of justice."

These cases and many others establish the proposition of law, binding upon this court, that statements compelled from a witness whose expressed desire to consult his counsel was improperly prevented by official action, cannot thereafter be used in the prosecution against him. As was stated in Massiah v. United States supra, at page 204:

> "The 'guiding hand of counsel' was essential to advise petitioner of his right in this delicate situation. Powell v. Alabama, 287 U. S. 45, 69. This was the stage when 'legal aid and advice' were most critical to petitioner."

Although the question of the procedure granting immunity to the accused has been passed upon by me on the original motion, the right to speak to counsel becomes important as the defendant would then be in a position to claim his constitutional privilege had he been so advised.

That the right to counsel is being more fully recognized is evident by the decision of the United States Supreme

Court in the Michael Vignera case decided only recently. Chief Justice Earl Warren in delivering the opinion, among other things, stated:

> "If the individual states that he wants an attorney the interrogation must cease until an attorney is present * * *".

While this statement referred to interrogation by the police of an accused suspected of the commission of a crime, I nevertheless hold that the refusal of the foreman of the grand jury and of the district attorney to allow the witness to speak to his counsel outside the grand jury room to ascertain his rights, deprived him of counsel in violation of both the State and Federal Constitutions. Since the indictment is predicated upon the statements made by him after the request for counsel was denied, I hold that the denial of the request when defendant most needed counsel violated his constitutional rights.

Chief Justice Warren, in the Vignera case supra, reaffirmed the decision in the Escobedo case, stating "that case was but an explication of basic rights that are enshrined in our Constitution—that 'no person * * * shall be compelled in any criminal case to be a witness against himself,' and that 'the accused shall * * * have the assistance of counsel'—rights which were put in jeopardy in that case through official overbearing."

This court does not suggest that in construing this decision, a witness before a grand jury in every case may be afforded the right to consult with counsel before answering any questions posed by the district attorney. In the instant case had the accused refused to answer questions on advice of counsel, he would have had the opportunity of having the court pass upon the propriety of his remaining silent or refusing to answer questions. The statement made by the assistant district attorney to the witness "that there is no legal question involved" is a

function for the court to pass upon as well as the decision of the foreman of the grand jury that before permitting the accused to consult with his attorney that "permission could not be given without the consent of the assistant district attorney". While this court does not intend to limit the right of the grand jury to investigate crime in this county, nevertheless the rights of a witness as well as an accused must be fully honored.

Accordingly, the decision previously rendered by this court on November 16, 1965 as well as the order entered thereon, if any, are vacated and set aside and the indictment in this case is dismissed.

Dated, June 22, 1966.

Charles Marks
J. S. C.

APPENDIX C

Majority Opinion of the New York Appellate Division

SUPREME COURT, APPELLATE DIVISION

First Department, May 1967

Bernard Botein, P. J.,
Samuel W. Eager,
Aron Steuer,
Benjamin J. Rabin,
Owen McGivern, JJ.

11768

The People of the State of New York,
Appellant,

vs.

Matthew Iannello,
Defendant-Respondent.

Appeal from order of the Supreme Court at Special and Trial Term (Marks, J.), entered June 22, 1966 in New York County, which granted a motion to dismiss an indictment.

William Sonenshine of counsel (Maurice Edelbaum and Evseroff, Newman & Sonenshine, attorneys) for respondent.

H. Richard Uviller of counsel (Frederick P. Havetz with him on the brief; Frank S. Hogan, District Attorney) for appellant.

Appendix C—Majority Opinion of the New York Appellate Division

Per Curiam:

Defendant was called to testify before a grand jury investigating the alleged existence of a conspiracy to bribe public officers. Having given answers allegedly evasive, equivocal and false, he was indicted for criminal contempt, charged with contumacious and unlawful refusal to answer legal and proper interrogatories (Penal Law, §600, subd. 6). The present appeal is by the People from an order which dismissed the indictment on the ground that the impugned answers were given after defendant had been denied access to his counsel who was outside the grand jury room. While we agree that the indictment is subject to dismissal, in our view it is unnecessary to reach the issue of defendant's right to consult counsel, nor need we consider whether defendant's response to the grand jury's questioning was "so false and evasive as to be equivalent to no answer at all" (*People ex rel. Valenti* v. *McCloskey*, 6 N Y 2d 390, 398).

Each count of the indictment alleges that defendant "was further informed that said Grand Jury had voted to confer immunity upon him from prosecution for any crimes that might be revealed by his testimony." The theory of the indictment, then, is that, having been granted immunity, defendant was bound to testify. The record, however, does not show that the grand jury had voted to grant him immunity, or that the conditions precedent to such a grant had been fulfilled. For example, defendant did not affirmatively claim his privilege (see *People* v. *Laino*, 10 N Y 2d 161, 172). The People's brief acknowledges that what happened before the grand jury fell short of "an operative conferral of statutory immunity." An essential premise

of the indictment cannot be proven; therefore, the indictment may not be sustained.

Furthermore it is questionable that the grand jury could constitute defendant a "witness" so that he may be deemed to have waived his privilege by not claiming it. The witnesses referred to in section 2447 of the Penal Law are persons "who are, in truth and fact, witnesses" (*People* v. *Steuding*, 6 N Y 2d 214, 217). This defendant, before he was subpoenaed, was known or suspected to have been an active participant in the briberies under investigation. In fact, the present indictment alleges that in the course of the grand jury investigation

> "* * * it became material and necessary to examine the defendant to inquire and ascertain whether a certain police sergeant of the Police Department of the City of New York had been receiving bribes from the defendant to allow the defendant to conduct his businesses, licensed bars and grills, in violation of the Penal Law and the Alcoholic Beverage Control Law of the State of New York * * *."

Thus, we conclude he was not a witness in the statutory sense. He was a prospective defendant or one who is a target of an investigation (*People* v. *Steuding*, 6 N Y 2d, *supra*, 216, 217).

Dismissal of the indictment is required; and the order entered June 22, 1966, granting defendant's motion to dismiss should be affirmed.

All concur except Steuer and Rabin, JJ., who dissent in a dissenting opinion by Steuer, J.

APPENDIX D

Dissenting Opinion of New York Appellate Division

STEUER, J.:

The People appeal from the dismissal of an indictment containing four counts for criminal contempt. Although the court below based decision on a single ground, we will discuss all three grounds advanced by the defendant.

The first ground is that there was insufficient evidence for the finding of the indictment. The four counts are based on the answers to four series of questions addressed to defendant while testifying before the grand jury. The questions referred to defendant's meetings and conversations had with certain police officers. As to all of these defendant answered that he did not remember. While it is doubtless true that presence or absence of recollection can never be categorically established, the circumstances may be such as to establish beyond a reasonable doubt that the professed lack of recollection is sham. The charge in the first count is that defendant answered that he did not recall whether in the past two weeks anyone had advised him to keep away from certain police officers. In the second and third counts it is stated that, after testifying that some police officers had been visitors at his farm, he could not recall the names of any of the officers except one. The fourth count concerns a meeting with a certain police sergeant which defendant admitted took place but defendant denied recollection whether the subject of a police investigation was mentioned. None of these incidents was so remote in time that recollection had faded. Rather it was asserted that the matters were so insignificant that they

could not be recalled. These answers could well be found to be so evasive as to amount to a refusal to answer, and so contemptuous (*People ex rel. Valenti* v. *McCloskey,* 6 N Y 2d 390, 398).

The second ground is that defendant was denied the right to consult counsel. For two reasons it is plain that this is no ground for dismissal. First, it is axiomatic that a witness is not entitled to counsel (*People* v. *Brayer,* 6 A D 2d 437; cf. *In re Groban,* 352 U. S. 330). Secondly, the record shows that defendant had the benefit of his counsel's advice as to his rights. What he complains about is that as a particular question was asked he requested leave to consult counsel before answering. Such disruptive tactics could render any grand jury proceedings nugatory.

The third, and weightiest, objection is as to whether the testimony given can itself be the basis of any criminal charge. Certain background facts are essential to any discussion of this issue. The grand jury inquiry was into the taking of bribes by police officers. Defendant was called as a witness who was believed to have some knowledge of this situation. A reading of the record leads to the conclusion, we believe inevitably, that the prosecutor believed that defendant was in all probability either a giver of the bribes or at least intimately connected with the transactions, but that he (the prosecutor) was not seeking to indict the defendant for that or any other crime. In fact, the prosecutor stated on the record his willingness to have the grand jury grant defendant immunity as to any transaction testified to, should the defendant request it. Instead, the defendant did not claim his privilege but evaded answering to a degree amounting to refusal.

Appendix D—Dissenting Opinion of New York Appellate Division

Prior to the enactment of Penal Law section 2447, a person subpoenaed before the grand jury automatically enjoyed immunity as to any matters on which he was questioned regardless of whether he asserted privilege or asked for immunity (*People ex rel. Lewisohn* v. *O'Brien*, 176 N.Y. 253; *People* v. *Sharp*, 107 N.Y. 427; *People* v. *Reiss*, 255 App. Div. 509, affd. 280 N.Y. 539). It was, however, felt that it was unfair, if a prosecutor in examining a witness before the grand jury incidentally discovered that the witness was guilty of some criminal activity, for the witness to escape prosecution for this reason (see *People* v. *Tenaglia*, 30 Misc 2d 1013, 1019). Apparently so far as the section carries out this purpose it is effectual, but not beyond that. So, while the section is said to be viable as to a true witness (*People* v. *Steuding*, 6 N Y 2d 214, 217), it is unconstitutional as whittling away the privilege of one who is a prospective defendant (*People* v. *Laino*, 10 N Y 2d 161).

It has always been recognized that crimes growing out of the giving of testimony itself, such as perjury or contempt, stand upon a somewhat different footing than crimes revealed by testimony. Where a witness contumaciously refuses to answer before the grand jury he can be prosecuted for contempt quite regardless of the fact that he may enjoy immunity as to the transactions as to which he refused to testify (*Matter of Prensky* v. *Geller*, 22 A D 2d 559, leave to appeal denied 16 N Y 2d 486, cert. denied 384 U. S. 101). Similarly, an indictment for perjury will lie where the answers are false (*People* v. *Feinberg*, 19 Misc 2d 433). To this there has always been an exception that the person against whom the grand jury inquiry is directed

may not be prosecuted for any dereliction in regard to his testimony. This is not on the ground that he enjoys immunity, but because it is illegal to bring him before the grand jury in the first place it is furthermore illegal to administer the oath, so that any step taken thereafter consequential on the taking of the oath is a nullity (*People* v. *Gillette,* 126 App. Div. 665, 670). That exception has not been affected by section 2447 (*People* v. *De Feo,* 308 N.Y. 595).

We come now to whether the defendant comes within the class of excepted persons. The current fashionable expression for persons so exempted is "target of the investigation." The brilliant color of the phrase obscures the fact that nobody knows exactly what it means. Clearly if defendant is one of the persons against whom the investigation is directed and whose indictment is the contemplated result of the investigation, he is exempted (*People* v. *Gillette, supra; People* v. *Laino, supra*). If he is merely a person having knowledge of the facts but apparently not implicated in the wrongdoing, it is equally clear that he is not. But most instances fall within these boundaries, and the persons described, while not the target, are within the target area. That is, they are suspected, more or less substantially, of some criminal activity in connection with the matter under investigation. The defendant here would come within this classification.

It quite often happens that in order to obtain an indictment as well as to get a conviction, a prosecutor must rely on the testimony of persons themselves criminally involved in the matter. This testimony is seldom proffered voluntarily. The prosecutor must make a conscious choice between those persons against whom he will proceed and those

he will excuse, in order to obtain any indictment. It would seem that once the prosecutor has made such an election, the person exempted ceases to be even a potential defendant. The proffer of immunity is completely inconsistent with subsequent indictment (see *People* v. *Feinberg, supra,* at p. 440, Geller, J.).

There can be no question but that that is the situation here. The defendant was specifically informed that he was being called as a witness only and that the grand jury was prepared to give him immunity if he requested it. Nothing could have been clearer than that the district attorney was prepared to forgo any effort to proceed against the defendant no matter what his testimony revealed, and there is no claim that this was not thoroughly understood by him. It follows that the point made in the majority opinion that defendant did not receive immunity is entirely immaterial. The sole question is whether he is a person to whom a grant of immunity would be effectual, in the sense that it would require him to testify. If he is within that class, no grant invokes any sanction for refusing to, or evading answering. If he is not, he is not excused because of his advised failure to claim his privilege.

To hold that this defendant, or anyone similarly situated, is a target and hence exempted means that the prosecuting office has no option as to which persons shall be prosecuted, and that in a situation where one of the malefactors is the sole source of the evidence, all must go free. We cannot conceive that the constitution so mandates.

The order entered June 22, 1966 should be reversed on the law and the indictment reinstated.

Rabin, J. concurs.

APPENDIX E

Opinion of the New York Court of Appeals

STATE OF NEW YORK

COURT OF APPEALS

1. No. 519. 67

THE PEOPLE &c.,

Appellant,

vs.

MATTHEW IANNIELLO,

Respondent.

BREITEL, J.

The People appeal from the dismissal of an indictment for criminal contempt under subdivision 6 of section 600 of the Penal Law. The indictment in separate counts charged four violations of the statute, based upon defendant's allegedly evasive, equivocal, and false responses to questions asked of him in two appearances before the New York County grand jury on June 11 and June 18, 1964. The Supreme Court, New York County, dismissed the indictment on the ground that defendant, while testifying as a witness before the grand jury, was denied the right to counsel when he was refused permission to leave the grand jury room to discuss the propriety of a question with his lawyer. The Appellate Division, by a divided court, affirmed without reaching the counsel issue on the ground that de-

fendant was immune from prosecution for contempt since he was a "target" of the inquiry. Two Justices, in dissent, disputed defendant's status as a target, and also concluded that under the circumstances in which defendant sought "advice," the refusal to permit defendant to consult with his lawyer did not amount to an improper interference with the right to counsel.

The order should be reversed and the indictment reinstated. Under the rule in *People* v. *Tomasello* (21 N Y 2d , *infra*), this defendant is subject to prosecution for criminal contempt for evasive testimony before the grand jury whether or not he was a possible defendant. Nor was he in fact deprived of any right to consult with his lawyer, although in a proper case a grand jury witness has such right.

Defendant, owner of "two licensed bars and grills" in the sensitive mid-town area, was called before the grand jury on June 11, 1964. At the outset, he refused to be sworn on the ground that he was a defendant in a pending misdemeanor prosecution. He was then told by an assistant district attorney that he was called "solely in the role of a witness" in the grand jury's investigation of a bribery conspiracy involving police and officials of the State Liquor Authority. After he was told by the prosecutor, before the grand jury, that the "grand jury is ready to confer immunity upon you should you consider any answers that you might have to give [incriminatory]," and after he had said that he understood the nature of this advice, he consented to being sworn. Defendant was thereafter questioned about conversations concerning investigations of police pay-

offs, which he allegedly had had with one Benny Cohen in 1963. When he stated that he could note recall such conversations, he was reminded that the grand jury had "voted to confer immunity" upon him; and that he was legally obligated to give truthful testimony. Pressed to affirm or deny that the conversations had taken place, defendant asked: "Could I excuse myself to see my attorney for a minute . . . I want to ask him if it's a proper question." This request was denied and, after defendant presisted in his request, the prosecutor suggested that they "go in open court . . . and make an application." This course was not pursued, however. Instead, the grand jury foreman, at the prosecutor's request, directed the witness to answer. He thereupon answered that he did not recall the conversations.

The questioning then turned to the subject of defendant's alleged meeting in September, 1963 with one O'Shea, a police sergeant. Although the conversation allegedly involved a confidential investigation pending against defendant's friend, Benny Cohen, defendant persisted in stating that he did not "recall" the conversation and could not affirm or deny that it had ever occurred. This testimony was the basis for one of the four contempt charges in the indictment.

The other three counts of the indictment dealt with testimony given when defendant was recalled, a week later, on June 18, 1964. They too involved defendant's purported inability to recall conversations in the recent past. Thus, defendant stated that he could not recall whether anyone had, within the previous six months, told him to stay away from Sergeant O'Shea because the officer was under investi-

gation. Nor could he recall having entertained police officers, other than a police captain at his farm.

The basis for the Appellate Division's opinion—the immunity enjoyed by a prospective defendant or target of investigation from prosecution for contempt on the basis of his grand jury testimony—was recently undermined by this Court in *People* v. *Tomasello* (21 N Y 2d). In the *Tomasello* case, the Court held that a grand jury witness who is a possible defendant or target and who has not received transactional immunity for a previously committed substantive offense under section 2447 of the Penal Law could nevertheless be prosecuted for perjury on the basis of his current testimony. The Court reasoned that such a witness enjoys the benefits of an exclusionary rule, often referred to as an "immunity," forbidding use of his compelled statements and any derivative evidence ("fruits") in a prosecution for a previously committed substantive crime. It held therefore that he is not also endowed "'with a license to commit perjury.'". Of course, this reasoning extends as well to prosecutions for contempt committed before the grand jury, particularly when (as here) the contempt involves answers "so false and evasive as to be equivalent to no answer at all" (*People ex rel. Valenti* v. *McCloskey*, 6 N Y 2d 390, 398). The "use" of testimony to establish contempt or perjury, where the current testimony itself constitutes the contempt or perjury, has been contrasted with the use of testimony to establish commission of a prior, substantive offense (8 Wigmore on Evidence [McNaughton rev. ed.], § 2282, pp. 511-512, cited in *People* v. *Tomasello, supra;* Penal Law, § 2447[2]). Hence, even if

defendant Ianniello was a target of the investigation, under the reasoning of the *Tomasello* case, he may nevertheless be punished for contempt for his delinquency in testifying. When a witness is not a target, of course, the propriety of subjecting him to the contempt sanction has never been questioned.

This case also raises a novel question concerning the existence and scope of the grand jury witness' right to consult with counsel. It is, of course, a familiar proposition that the lawyer for a witness is not entitled to be present in the grand jury room (see, e.g. *Anonymous* v. *Baker,* 360 U.S. 287, 292; *In re Groban,* 352 U.S. 330, 333; *United States* v. *Scully,* 225 F.2d 113, 115-116, cert. den. 350 U.S. 897; *In re Black,* 47 F.2d 542, 543; cf. *People ex rel. McDonald* v. *Keeler,* 99 N.Y. 463, 484-485; *Matter of M. Anonymous* v. *Arkwright,* 5 A D 2d 790, 791, *mot. for lv. to ap. den.* 4 N Y 2d 676). This rule rests upon the statutory exclusion of all except certain authorized persons before the grand jury and the need to preserve the secrecy of grand jury proceedings (Code of Crim. Pro., §§ 255-259). There remains, however, the further question whether the witness should not be entitled to leave the grand jury room to consult with his lawyer (see *United States* v. *Leighton,* 265 F.Supp. 27, 38; *United States* v. *Kane,* 243 F.Supp. 746; *United States* v. *Grunewald,* 164 F.Supp. 640, all indicating that the procedure in the Southern District of New York is to exclude the lawyer but to permit the witness to leave the grand jury room and consult with him; this is also done in state grand jury proceedings [see, e.g., *People* v. *DeFeo,* 284 App. Div. 622, 627, rev'd on other grounds, 308 N.Y. 595]). Such con-

duct by the witness does not violate the statutory policy of secrecy, for it has always been understood that the witness is at all times free to discuss his testimony outside the grand jury room. Whether and to what extent the witness ought to have a right to consult with his lawyer depends upon an analysis of the proper role of counsel in these circumstances, and the need to avoid procedural strictures which would impair the effectiveness of grand jury investigation.

Since a grand jury proceeding is properly an investigation rather than a prosecution directed against the witness, the witness has no right to be "represented" by counsel, in the technical sense (see, e.g., *In re Groban*, 352 U.S. 330, 332-333, *supra*). However, in light of current recognition of the importance of counsel in providing effective notice of rights, it is difficult to maintain that the witness is not entitled to the advice of his lawyer (cf. *Miranda* v. *Arizona*, 384 U.S. 436, 475; *Escobedo* v. *Illinois*, 378 U.S. 478, 486; *People* v. *Donovan*, 13 N Y 2d 148, 153). As a matter of fairness, government ought not compel individuals to make binding decisions concerning their legal rights in the enforced absence of counsel (see *Matter of Conlon* v. *Murphy*, 24 A D 2d 737 [patrolman could not be dismissed, without notice of hearing, on the basis of his refusal to give further grand jury testimony, after he had asked for and been denied an opportunity to consult counsel]). Courts have a particular responsibility to prevent unfairness in grand jury proceedings, for the grand jury is an "arm of the court" (see, e.g., *Matter of Spector* v. *Allen*, 281 N.Y. 251, 260; *People* v. *Pisanti*, 179 Misc. 308, 309).

The legal rights which may be critically affected before the grand jury, and concerning which the witness should be

entitled to consult with his lawyer, are several. First, the witness may be put in a position of determining whether to assert or waive his privilege against self-incrimination. When the witness is a "target" of the investigation, his statements and any evidence derived from them ("fruits") cannot be used in a prosecution against him for a previous substantive offense unless he expressly waives the privilege (*People* v. *Steuding*, 6 N Y 2d 214). Even he, however, must make a legally significant choice in answering or claiming his privilege; unless he claims his privilege he does not receive transactional immunity under section 2447 of the Penal Law. The witness who is not a target of the inquiry faces an even more critical decision for, unless he claims his privilege and thereby invokes immunity, his statements can be used against him substantively. Faced with a confusing variety of rules concerning the existence and scope of his privileges, a witness should not be required to make these choices unaided by his lawyer.

A second legal right which may be affected before the grand jury is the witness' right to refuse to answer questions having no bearing on the subject of the investigation (see *Matter of Koota* v. *Colombo*, 17 N Y 2d 147, 150). To prevent unwarranted intrusion into the witness' privacy, he ought to be allowed to consult with his lawyer concerning the propriety of grand jury questioning. Finally, where a question may involve a testimonial privilege enjoyed by the witness or to which he may be subject—for example, between attorney and client, doctor and patient or husband and wife—the witness should be permitted to consult with counsel.

Whenever a witness demands to see his lawyer for counselling concerning his legal rights (as opposed to mere strategic advice), he should be given an opportunity to do so. If his right is denied, however, he does not have license to commit perjury or contempt. Rather, he must persist in his refusal to answer, thus forcing the prosecutor to take

the matter into open court for a ruling. By requiring the matter to be taken to the presiding justice, the proceeding is expedited and the danger of stalling tactics reduced. The judge can rule on questions of pertinency, after argument of counsel. He can determine whether a colorable claim of testimonial privilege is presented, and can inform the defendant of the extent of his immunity from prosecution for prior offenses. Where a witness persists in raising objections which are palpably not in good faith, the judge may compel him to desist from this course under the sanction of contempt proceedings.

This procedure was not followed here. Instead, defendant undertook to answer the prosecutor's questions, albeit in an evasive manner. If the instant record left any room for the possibility that defendant in fact needed legal counsel or, in good faith, asked for aid of counsel in a proper matter (as opposed to strategic advice in answering questions), affirmance would be required in the interests of fairness. The record, however, makes it abundantly clear that the aid of counsel was not required, and that defendant with full awareness was seeking help only in answering questions he found embarrassing. Defendant's request for his lawyer's advice was limited to whether the question put to him was "proper." Yet, the pertinence, indeed the relevance, of the question was never really in issue: it dealt with an alleged conversation concerning police payoffs, and defendant had been told initially that the purpose of the grand jury investigation was to "determine if there was in existence a conspiracy to bribe or give unlawful fees to public officials of the City of New York, to wit, the Police Department." He never raised any doubt as to the scope of the inquiry.

Defendant did not request advice concerning any testimonial privileges, or his privilege against self-incrimination, or the obtaining of transactional immunity. Indeed, he had been repeatedly told that the grand jury was interested

in him only as a witness, and that it was prepared to confer immunity upon him.

Finally, three of the contempt counts refer to testimony given after a week's recess, during which defendant had extended opportunity to consult with his lawyer and undoubtedly did so, and hence are free of taint. The appearance before the grand jury a week after the first meeting is critically important. By that time defendant had the fullest opportunity to consult with counsel. Actually, the only area in which he still needed proper lawful advice was with respect to his status as a witness given transactional immunity. The grand jury was still insisting unequivocally that it was giving him immunity or was ready to do so, and there was no assertion by anyone or implication from anything that he had waived any rights to his privilege against self-incrimination or that he was not entitled to the fullest immunity allowed by the statute. His conduct on his second appearance before the grand jury therefore presents no difficulty in assessing it as contemptuous and is highly persuasive in confirming that his purpose in asking to speak with his lawyer on the first occasion was specious and without legal basis.

It should be noted in passing that defendant argues that he had not obtained full transactional immunity under section 2447 of the Penal Law, although it is all but impossible that he could or would be prosecuted for a substantive offense after the repeated assurances given to him by officials authorized to confer immunity under an enabling statute. True, to obtain full immunity under section 2447, the witness must "refuse to answer a *particular question*" on grounds of privilege, and then answer the question when ordered to do so by the grand jury (*People* v. *Laino*, 10 N Y 2d 161, 173-174, emphasis in original). Defendant Ianniello never literally refused to answer a specific question on the ground of privilege at any one time, but he made it patent

that he would not be sworn or answer questions unless he was given immunity, calling attention to the fact that there was a criminal action pending against him. After he was told that he would have full immunity he was sworn and purported to answer the questions put to him. Later when he refused to answer some questions, he was directed to do so. All the conditions referred to in the *Laino* case, *supra*, were thus satisfied. The only thing absent is the literal mouthing of the traditional words in claiming the privilege against self-incrimination. Even if, and it is difficult to conceive, defendant did not obtain transactional immunity, however, it is of no relevance to his right-to-counsel claim. Defendant's request for counsel did not relate to an issue of self-incrimination, but only to one of pertinency. The record indicates that there was no bona fide issue as to the pertinency of the question and therefore no need to consult with counsel on that issue.

Defendant finally contends that the "evidence adduced before the Grand Jury was insufficient in law to have warranted the finding of the indictment." This contention is without merit. Defendant's answers before the grand jury, dealing with significant conversations in the recent past, could well be found evasive by a jury. Consequently, they may well come within the rule that contempt is committed when a defendant's response is "so false and evasive as to be equivalent to no answer at all" (*People ex rel. Valenti* v. *McCloskey*, 6 N Y 2d 390, 398, *supra*).

Accordingly, the order of the Appellate Division should be reversed and the indictment reinstated.

* * * * *

Order reversed and the indictment reinstated. Opinion by Breitel, J. All concur.

APPENDIX F

Judgment of the New York Court of Appeals

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 21st day of February in the year of our Lord one thousand nine hundred and sixty-eight, before the Judges of said Court.

Witness,
The HON. STANLEY H. FULD,
Chief Judge, *Presiding.*
RAYMOND J. CANNON, *Clerk.*

REMITTITUR February 21, 1968

1. No. 518 67

THE PEOPLE, &c.,
Appellant,

vs.

MATTHEW IANNIELLO,
Respondent.

BE IT REMEMBERED, That on the 10th day of November in the year of our Lord one thousand nine hundred and sixty-seven, The People &c., the appellant in this cause, came here unto the Court of Appeals, by Frank S. Hogan, District Attorney, and filed in the said Court a Notice of Ap-

peal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Matthew Ianniello, the respondent in said cause, afterwards appeared in said Court of Appeals by William Sonenshine and Maurice Edelbaum, his attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, the said Court of Appeals having heard this cause argued by Mr. H. Richard Uviller, of counsel for the appellant, and by Mr. William Sonenshine, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein and the same hereby is reversed and the indictment reinstated.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, then to be proceeded upon according to law.

THEREFORE, it is considered that the said order be reversed &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be

enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the
State of New York

COURT OF APPEALS, CLERK'S OFFICE,
Albany, February 21, 1968.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk

(SEAL)

APPENDIX G

United States Constitution, Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of Counsel for his defence."

APPENDIX H

United States Constitution, Amendment XIV

"Section 1 * * * nor shall any state deprive any person of life, liberty or property, without due process of law; * * *."

APPENDIX I

New York Penal Law, Section 600

"Section 600. Criminal Contempt.

A person who commits a contempt of Court, of any one of the following kinds is guilty of a misdemeanor:

* * * 6. Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn to answer any legal and proper interrogatory; * * *."

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IN THE

Supreme Court of the United States

October, 1968 Term

No. [redacted] 107

MATTHEW IANNIELLO,

Defendant-Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

OPPOSITION TO CERTIORARI

FRANK S. HOGAN
District Attorney
New York County
Attorney for Respondent
155 Leonard Street
New York, New York 10013

H. RICHARD UVILLER
Assistant District Attorney
Of Counsel

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IN THE

Supreme Court of the United States

October, 1967 Term

No. 1443

MATTHEW IANNIELLO,

Defendant-Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

OPPOSITION TO CERTIORARI

Statement

The People of the State of New York, respondent herein, respectfully oppose the petition for a writ of certiorari to the New York Court of Appeals on the ground that no substantial federal question is presented by the decision of that Court in the present matter.

The Facts

On February 2, 1965, defendant was indicted in four counts for the crime of CRIMINAL CONTEMPT [Penal Law §600 (6)] arising out of appearances on June 11 and June 18, 1964, before the Fourth January 1964 New York County Grand Jury. That grand jury had been extended beyond its regular term to continue its investigation of corruption in the State Liquor Authority and related corruption in the New York City Police Department.

At the outset of his initial appearance on June 11, Ianniello, the owner of two bars in the Times Square area, engaged in the following colloquy with the district attorney:

> "Q. Mr. Ianiello [*sic*], I want you to be aware of the fact that you have been called here solely in the role of a witness, and this grand jury is conducting an investigation to determine if there was in existence a conspiracy to bribe or give unlawful fees to public officials of the City of New York, to wit, the Police Department or to public officials connected with the New York State Liquor Authority. Do you understand what I'm saying? A. Yes, sir.
>
> "Q. Now, in your role as a witness this grand jury is ready to confer immunity upon you should you consider any answers that you might give to a question directed at you by this grand jury might tend to incriminate you. Do you understand that? A. Do you mean in any field of the investigation?
>
> "Q. If you think that any answer that you might give to a question directed to you by this grand jury might tend to incriminate you this grand jury is prepared to grant you immunity so that when you give that answer that answer cannot be used against you

in any criminal proceeding. Do you understand that? A. I understand that" (1103-4).*

Shortly thereafter the following colloquy occurred:

"Q. Just a minute. You know, as Mr. McKenna brought out, this grand jury has voted to confer immunity upon you. A. Yes, sir.

"Q. From prosecution for whatever crimes your testimony may disclose. Do you understand that? A. I understand.

"Q. And you do appreciate that you are expected to give truthful testimony. You understand that? A. Yes, sir.

"Q. You are legally obligated to do so. A. Yes, sir.

"Q. You understand that? A. Yes, sir.

"Q. Now, this grand jury wants your testimony as a witness. You understand that? A. Yes, sir.

"Q. And you are called here exclusively in the role of a witness. Do you understand that? A. Yes, sir" (410-11).

After some questioning, Ianniello requested to confer with his attorney outside the grand jury room because he thought a question just put to him was "improper" (1119-20). The prosecutor denied the request, stating:

"Mr. Ianniello, we are not going to consent to the practice of your excusing yourself to confer ostensibly with your attorney in order to find out what kind of an answer you should make. You are the one that is legally obligated to give testimony and not your attorney" (1119).

Questioning then resumed. The testimony after this last exchange constituted the basis of the fourth count of the indictment.

* References, unless otherwise noted, are to the typewritten grand jury minutes of June 11, 1964.

One week later, on June 18, 1964, Ianniello again appeared before the grand jury at which time he stated that he had consulted with his attorney (1213). His testimony on this date is the predicate of the first three counts of the indictment.

On March 18, 1965, petitioner demurred to the indictment filed against him the previous month. The demurrer was disallowed (GELLINOFF, J.). In October, 1965, petitioner moved to dismiss the indictment, and the motion was denied [(MARKS, J.); opinion in petitioner's brief, appendix A].

Subsequently, petitioner moved for reargument of his motion to dismiss, alleging, *inter alia,* that the testimony constituting the basis of the indictment was obtained in violation of his right to counsel and his privilege against self-incrimination. On June 22, 1966, the court (MARKS, J.) granted reargument and dismissed the indictment, basing his decision solely on petitioner's right-to-counsel contention (opinion in petitioner's brief, appendix B).

The Decision Below

The Court of Appeals, unanimously per BREITEL, J., wrote as follows concerning the presently asserted grounds for certiorari:

> "'This case also raises a novel question concerning the existence and scope of the grand jury witness' right to consult with counsel. It is, of course, a familiar proposition that the lawyer for a witness is not entitled to be present in the grand jury room (see, e.g.,

Anonymous v. *Baker*, 360 U.S. 287, 292; *In re Groban*, 352 U.S. 330, 333; *United States* v. *Scully*, 225 F.2d 113, 115-116, cert. den. 350 U.S. 897; *In re Black*, 47 F.2d 542, 543; cf. *People ex rel. McDonald* v. *Keeler*, 99 N.Y. 463, 484-485; *Matter of M. Anonymous* v. *Arkwright*, 5 A D 2d 790, 791, mot. for lv. to ap. den. 4 N Y 2d 676). This rule rests upon the statutory exclusion of all except certain authorized persons before the grand jury and the need to preserve the secrecy of grand jury proceedings (Code of Crim. Pro., §§255-259). There remains, however, the further question whether the witness should not be entitled to leave the grand jury room to consult with his lawyer (see *United States* v. *Leighton*, 265 F.Supp. 27, 38; *United States* v. *Kane*, 243 F.Supp. 746; *United States* v. *Grunewald*, 164 F.Supp. 640, all indicating that the procedure in the Southern District of New York is to exclude the lawyer but to permit the witness to leave the grand jury room and consult with him; this is also done in state grand jury proceedings [see, e.g., *People* v. *DeFeo*, 284 App. Div. 622, 627, rev'd on other grounds, 308 N.Y. 595]). Such conduct by the witness does not violate the statutory policy of secrecy, for it has always been understood that the witness is at all times free to discuss his testimony outside the grand jury room. Whether and to what extent the witness ought to have a right to consult with his lawyer depends upon an analysis of the proper role of counsel in these circumstances, and the need to avoid procedural strictures which would impair the effectiveness of grand jury investigation.

"Since a grand jury proceeding is properly an investigation rather than a prosecution directed against the witness, the witness has no right to be 'represented' by counsel, in the technical sense (see, e.g., *In re Groban*, 352 U.S. 330, 332-333, *supra*). However, in light of current recognition of the importance of

counsel in providing effective notice of rights, it is difficult to maintain that the witness is not entitled to the advice of his lawyer (cf. *Miranda* v. *Arizona*, 384 U.S. 436, 475; *Escobedo* v. *Illinois*, 378 U.S. 478, 486; *People* v. *Donovan*, 13 N Y 2d 148, 153). As a matter of fairness, government ought not to compel individuals to make binding decisions concerning their legal rights in the enforced absence of counsel (see *Matter of Conlon* v. *Murphy*, 24 A D 2d 737 [patrolman could not be dismissed, without notice or hearing, on the basis of his refusal to give further grand jury testimony, after he had asked for and been denied an opportunity to consult counsel]). Courts have a particular responsibility to prevent unfairness in grand jury proceedings, for the grand jury is an 'arm of the court' (see, e.g., *Matter of Spector* v. *Allen*, 281 N.Y. 251, 260; *People* v. *Pisanti*, 179 Misc. 308, 309).

"The legal rights which may be critically affected before the grand jury, and concerning which the witness should be entitled to consult with his lawyer, are several. First, the witness may be put in a position of determining whether to assert or waive his privilege against self-incrimination. When the witness is a 'target' of the investigation, his statements and any evidence derived from them ('fruits') cannot be used in a prosecution against him for a previous substantive offense unless he expressly waives the privilege (*People* v. *Steuding*, 6 N Y 2d 214). Even he, however, must make a legally significant choice in answering or claiming his privilege; unless he claims his privilege he does not receive transactional immunity under section 2447 of the Penal Law. The witness who is not a target of the inquiry faces an even more critical decision for, unless he claims his privilege and thereby invokes immunity, his statements can be used against him substantively. Faced with a confusing variety of

rules concerning the existence and scope of his privileges, a witness should not be required to make these choices unaided by his lawyer.

"A second legal right which may be affected before the grand jury is the witness' right to refuse to answer questions having no bearing on the subject of the investigation (see *Matter of Koota* v. *Colombo*, 17 N Y 2d 147, 150). To prevent unwarranted intrustion into the witness' privacy, he ought to be allowed to consult with his lawyer concerning the propriety of grand jury questioning. Finally, where a question may involve a testimonial privilege enjoyed by the witness or to which he may be subject—for example, between attorney and client, doctor and patient or husband and wife—the witness should be permitted to consult with counsel.

"Whenever a witness demands to see his lawyer for counselling concerning his legal rights (as opposed to mere strategic advice), he should be given an opportunity to do so. If his right is denied, however, he does not have license to commit perjury or contempt. Rather, he must persist in his refusal to answer, thus forcing the prosecutor to take the matter into open court for a ruling. By requiring the matter to be taken to the presiding justice, the proceeding is expedited and the danger of stalling tactics reduced. The judge can rule on questions of pertinency, after argument of counsel. He can determine whether a colorable claim of testimonial privilege is presented, and can inform the defendant of the extent of his immunity from prosecution for prior offenses. Where a witness persists in raising objections which are palpably not in good faith, the judge may compel him to desist from this course under the sanction of contempt proceedings.

"This procedure was not followed here. Instead, defendant undertook to answer the prosecutor's questions, albeit in an evasive manner. If the instant record left any room for the possibility that defendant in fact needed legal counsel or, in good faith, asked for aid of counsel in a proper matter (as opposed to strategic advice in answering questions), affirmance would be required in the interests of fairness. The record, however, makes it abundantly clear that the aid of counsel was not required, and that defendant with full awareness was seeking help only in answering questions he found embarrassing. Defendant's request for his lawyer's advice was limited to whether the question put to him was 'proper.' Yet, the pertinence, indeed the relevance, of the question was never really in issue: it dealt with an alleged conversation concerning police payoffs, and defendant had been told initially that the purpose of the grand jury investigation was to 'determine if there was in existence a conspiracy to bribe or give unlawful fees to public officials of the City of New York, to wit, the Police Department.' He never raised any doubt as to the scope of the inquiry.

"Defendant did not request advice concerning any testimonial privileges, or his privilege against self-incrimination, or the obtaining of transactional immunity. Indeed, he had been repeatedly told that the grand jury was interested in him only as a witness, and that it was prepared to confer immunity upon him.

"Finally, three of the contempt counts refer to testimony given after a week's recess, during which defendant had extended opportunity to consult with his lawyer and undoubtedly did so, and hence are free of taint. The appearance before the grand jury a week after the first meeting is critically important. By that time defendant had the fullest opportunity to consult with counsel. Actually, the only area in which he still

needed proper lawful advice was with respect to his status as a witness given transactional immunity. The grand jury was still insisting unequivocally that it was giving him immunity or was ready to do so, and there was no assertion by anyone or implication from anything that he had waived any rights to his privilege against self-incrimination or that he was not entitled to the fullest immunity allowed by the statute. His conduct on his second appearance before the grand jury therefore presents no difficulty in assessing it as contemptuous and is highly persuasive in confirming that his purpose in asking to speak with his lawyer on the first occasion was specious and without legal basis."

POINT

As a grand jury witness, petitioner had no right to counsel.

The *nisi prius* court held that the right to counsel under the Sixth Amendment of the United States Constitution and Article I, Section 6 of the New York State Constitution was violated here because of:

> "the refusal of the foreman of the grand jury and of the district attorney to allow the witness to speak to his counsel outside the grand jury room to ascertain his right" (Record on Appeal, p. 31).

Rejected by the New York Court of Appeals, this position is now urged on this Court. The position, we believe, is essentially unsound, and the present case does not properly present the issue.

Inimical to the very nature of grand jury proceedings is the right here asserted by petitioner. The grand jury's

operation is fundamentally distinct from the normal forum of lawyers, being closed and *ex parte* [Code Crim. Proc. §§258, 952-p; *People* v. *Glen,* 173 N.Y. 395 (1903); *United States* v. *Levine,* 362 U.S. 610 (1910)]. Because the grand jury operates *ex parte,* "not charged with the duty of deciding innocence or guilt," its proceedings:

> "have never been conducted with the assiduous regard for the preservation of procedural safeguards which normally attends the ultimate trial of the issues. Thus, in such proceedings, there is no right to counsel, no right of confrontation, no right to cross-examining or to introduce evidence in rebuttal" [*United States* v. *Scully,* 225 F.2d 113, 116 (2d Cir. 1955) (MEDINA, J.)].

To accord a grand jury witness free access to counsel would not only affront the historic function of the grand jury, but would contort the nature of the right to counsel guaranteed in the New York and United States Constitutions. An ordinary witness before an investigative panel who challenges the propriety of a question can expect no comfort from those provisions. The rights there accorded are rights of an accused, a status Ianniello never achieved, nor was destined for [*Massiah* v. *United States,* 377 U. S. 201 (1964); *White* v. *Maryland,* 373 U. S. 59 (1963); *Hamilton* v. *Alabama,* 368 U. S. 52 (1961); *People* v. *Donovan,* 13 N.Y.2d 148 (1963); *People* v. *Meyer,* 11 N.Y.2d 162 (1962); *People* v. *Noble,* 9 N.Y.2d 571 (1961); *People* v. *DiBiasi,* 7 N.Y.2d 544 (1960)]. Ianniello, a mere witness in the grand jury, had no right to counsel [*In re Groban,* 352 U. S. 330 (1957) (majority and dissenting opinions); see *Jones* v. *United States,* 342 F.2d 863, 880 (D. C. Cir. 1964); *In re Black,* 47 F.2d 542 (2d Cir. 1955) (A. HAND, J.);

Kane v. *United States,* 243 F.Supp. 746 (S. D. N. Y. 1965)]. Indeed, some courts have held that even the prospective defendant has no right to counsel at the grand jury stage of the proceedings [*United States* v. *Scully,* 225 F.2d 113 (2d Cir. 1955), cert. den. 350 U. S. 897 (1955); *Gilmore* v. *United States,* 129 F.2d 199 (10th Cir. 1942), cert. den. 317 U. S. 631 (1942)].

Furthermore, the Sixth Amendment rarely calls for the services of counsel before the commencement of a legal action by the filing of a charge, an event which, of course, had not occurred in the present case. The two exceptional cases in which the right to counsel materialized before the status of "accused" was fully achieved were clearly rationalized by this Court in a manner which would exclude the witness before the grand jury. In both *Escobedo* v. *Illinois,* 378 U. S. 478 (1964), and the *Wade-Gilbert-Stovall* trilogy, 388 U. S. 218, 268, 293 (1967), an attorney was provided to prevent sealing the fate of the potential defendant at the preliminary "investigative" stage. The Constitution commands the assistance of counsel only at the "critical stages" of a criminal action [*Hamilton* v. *Alabama,* 368 U. S. 52 (1961)]. The grand jury, having elected to treat Ianniello as a witness purely, eliciting his testimony cannot be fairly viewed as a stage in a criminal prosecution *of him,* much less a critical stage demanding protection by an attorney. For this reason, the reliance on *Miranda* v. *Arizona,* 384 U. S. 436 (1966), by the petitioner is wholly misplaced. Equally inapposite would be an attempted analogy with more recent holdings interpreting the scope of the Sixth Amendment's assurance of counsel to the accused.

Moreover, the operative context of the *Miranda* requirements, "custodial interrogation," is entirely absent in the present situation. The inherent compulsion of the station house "atmosphere" [*id.* at 457] is clearly not present in the grand jury "composed of 12 to 23 members selected from the general citizenry * * * [who] have no axes to grind and are not charged personally with the administration of the law" [*In re Groban,* 352 U. S. 330, 347 (1957) (BLACK, J., dissenting), cited by majority in *Miranda, supra* at 466, n. 36 and *Escobedo* v. *Illinois,* 378 U. S. 478, 487-8 (1964); see Enker and Elsen, "Counsel for the Suspect: *Massiah* v. *United States* and *Escobedo* v. *Illinois,*" 49 Minn. L.Rev. 47, 91 (1964)].

Any question this witness might have had on whether a particular question was "proper," should have been, and could easily have been posed to the grand jury foreman, an impartial citizen who is disassociated with the prosecution and has direct access to the court for a ruling on matters of this kind. The respondent's lawyer, regardless of his sagacity, could neither have advised (having no knowledge of the context) nor ruled (having no authority) upon the question. Neither the state nor federal guarantee of counsel accords that right in such meaningless and patently inappropriate circumstances. As this Court observed many decades ago, a grand jury witness must:

> "tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry.
>
> "He is not entitled to urge objections of incompetency or irrelevance, such as a party might raise, for

this is no concern of his'' [*Blair* v. *United States*, 250 U. S. 273, 282 (1919)].

Finally, even assuming, incorrectly, that Ianniello was deprived of a right to counsel during his first grand jury appearance, that virus would infect only the testimony given at that session. That testimony is utilized only in the last count of the indictment. As to his second appearance, the testimony given at that time, forming the basis of the first three counts of the indictment, was clearly not obtained in violation of his right to counsel. Ianniello stated at the outset of that appearance that he had consulted with his attorney, and he made no request, as he did during the first session, to confer with his attorney outside the grand jury room. Hence, any infringement of petitioner's right to counsel affects only one of the four counts of the indictment.

In the light of these considerations, the opinion of the New York Court of Appeals went considerably further than the Constitution requires in assuring to a witness before a grand jury that any bona fide need for the assistance of counsel will be accommodated. Indeed, the decision below can be read as granting the full claim of the defendant to this Court, in a proper case. For the heart of the holding below is the finding that, upon the present record, Ianniello was merely employing a strategic device to obtain temporary respite from questioning. Thus, the Court wrote:

> ''Whenever a witness [before the grand jury] demands to see his lawyer for counselling concerning his

legal rights (as opposed to mere strategic advice), he should be given the opportunity to do so."

And again:

> "If the instant record left any room for the possibility that defendant in fact needed legal counsel or, in good faith, asked for aid of counsel in a proper matter (as opposed to strategic advice in answering questions), affirmance [of the reversal by the intermediate appellate court] would be required in the interests of fairness. The record, however, makes it abundantly clear that the aid of counsel was not required, and that defendant, with full awareness, was seeking help only in answering questions he found embarrassing."

While quoting this language in his brief to this Court, the petitioner makes no serious effort to overcome or contradict its factual predicate. Indeed, he can not. Nor is there any basis in the record for this Court to come to a contrary conclusion. In these circumstances, the very narrow holding below presents no constitutional question of sufficient substance to warrant review. The broad question which petitioner seeks to pose is, quite simply, not presented where the court below has, for all practical purposes, granted access of a grand jury witness to his lawyer in any case where the barest claim of legitimate need can possibly be sustained. Surely, this tribunal need not concern itself with tactical ploys (fairly determined below to be such) masquerading as the assertions of constitutional rights.

Conclusion

The petition for certiorari should be denied or dismissed.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

H. RICHARD UVILLER
Assistant District Attorney
Of Counsel

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